STATE OF MICHIGAN

COURT OF APPEALS

JEAN DILLON-BARBER,

Plaintiff-Appellee/Cross-Appellant,

v

REGENTS OF THE UNIVERSITY OF MICHIGAN,

Defendant-Appellant/Cross-Appellee.

and

SUSAN SHEPPARD and LINDA BOYLE CREPS,

Defendants.

UNPUBLISHED
June 7, 2005

No. 250596
Washtenaw Circuit Court
LC No. 99-011089-CZ

Before: Murray, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

In this disability discrimination and retaliation case plaintiff litigated and lost her claims in federal court, and then brought essentially the same claims in state court under Michigan's Persons With Disabilities Civil Rights Act (PWDCRA), MCL 37.1101, *et seq*. This Court granted defendant Regents of the University of Michigan (hereafter, the university) application for leave to appeal the trial court's denial of its motion for summary disposition with regard to plaintiff's claims that because of her depression, she was discriminated against and subjected to improper medical testing. Plaintiff cross-appeals the dismissal of her attention deficit disorder (ADD) discrimination claims and dismissal of her PWDCRA claims against the individual defendants. We affirm in part, reverse in part, and remand for entry of judgment for defendants.

I. Summary of Facts and Proceedings

Plaintiff began working for the university in 1980, when she was hired as a program analyst in the Medical Center Information Technology (MCIT) unit. After a series of promotions, plaintiff became a senior programmer analyst/senior system analyst in 1988. In 1993 and 1994 plaintiff took several medical leaves of absence to treat for depression. In June

1995, plaintiff's psychiatrist (Dr. Bruce Schweiger) diagnosed her as suffering from ADD. That same month during her annual performance evaluation, plaintiff disclosed her ADD diagnosis to her supervisor, defendant Susan Sheppard. According to plaintiff, during August 1995, Sheppard several times asked plaintiff for medical documentation confirming the ADD diagnosis. Plaintiff provided documentation from Dr. Schweiger confirming her diagnosis of ADD, and major depressive disorder.

Plaintiff also alleges that she asked Sheppard for a referral to the university's staff benefits office but Sheppard refused to do so. Plaintiff claims Sheppard instead informed plaintiff that the university required a second medical opinion confirming her ADD diagnosis. Accordingly, Sheppard informed plaintiff that she must submit to an examination to be performed by a psychiatrist chosen by the university, Dr. Thomas Carli. Plaintiff submitted to the examination on November 6, 1995. Dr. Carli referred plaintiff to Doctors Giordani and Conant for additional testing regarding her ADD. Giordani and Conant suggested some accommodations for plaintiff, including dividing tasks into smaller units, using a daily planner, structuring short breaks into the workday, and documenting certain performance consequences in writing. In his report to the university, Dr. Carli could not reach a conclusion that plaintiff had ADD, but he concurred in the recommendations of Doctors Giordani and Conant that plaintiff would benefit from some accommodations in the performance of her job. According to plaintiff, her subsequent and repeated requests for accommodation were refused.

Plaintiff alleges Sheppard refused to assign senior level work to plaintiff and negatively evaluated her work performance because of plaintiff's ADD and depression. On November 15, 1996, defendant Linda Boyle Creps, the director of the Clinical Information Systems unit of the Medical Center, terminated plaintiff's employment.

On January 5, 1998, plaintiff filed a nine-count complaint[1] in the United States District Court, Eastern District of Michigan, alleging that she was unlawfully discriminated against because she suffers from the disabilities of chronic major depression, ADD, and morbid obesity and that her termination violated the Americans with Disabilities Act (ADA), 42 USC § 12102 *et seq*. (Count I), that her termination violated the Rehabilitation Act, 29 USC § 701, *et seq*. (Count II), that her termination violated Michigan's PWDCRA, MCL 37.1101, *et seq*. (Count III), that her termination violated the Elliot-Larsen Civil Rights Act (ELCRA), MCL 37.2102 *et seq*. (Count IV), and that her termination constituted retaliation in violation of the ADA (Count V), the Rehabilitation Act (Count VI), the PWDCRA (Count VII) and the ELCRA (Count VIII). Plaintiff also alleged in Count IX a violation of 42 USC 1983, asserting defendants deprived her of "her to privacy under the First Amendment and her rights to be free from discrimination under the ADA and Rehab Act." This last count apparently was based on allegations that Dr. Carli's examination was unnecessary and overbroad in scope.

After the parties stipulated to dismiss plaintiff's state claims without prejudice, defendants moved for summary disposition, which the district court granted, dismissing

[1] Docket No. 98-CV-70016-DT, assigned to Judge Gerald E. Rosen.

plaintiff's complaint in its entirety (including the previously dismissed state claims) by opinion and order entered on September 9, 1999.

The district court addressed plaintiff's claims under the ADA, the Rehabilitation Act, and under Michigan's handicappers' civil rights act (HCRA), now the PWDCRA. The court first noted that the standards for proving a violation of the ADA and Michigan's HCRA are identical, citing *McKay v Toyota Motor Mfg, USA, Inc*, 110 F3d 369, 371 (CA 6, 1997), *Gilday v Mecosta Co*, 124 F3d 760, 762 (CA 6, 1997), and *Chmielewski v Xermac, Inc*, 457 Mich 593, 602; 580 NW2d 817 (1998). Further, the court noted ADA standards apply to discrimination and accommodation claims brought under the Rehabilitation Act, citing 29 USC 794(d), and *Andrews v Ohio*, 104 F3d 803, 807 (CA 6, 1997). In addition, the district court reasoned that the definition of "disability" under federal law, and "handicap," (now "disability") under state law, "each require a plaintiff to have a condition that substantially limits a major life activity," citing 42 USC 12102(2)(A), MCL 37.1103(e)(i)(A) [now MCL 37.1103(d)(1)(A)], and *Chmielewski, supra* at 605. (Slip op, p 16). The court concluded on the basis of the evidence that plaintiff produced that she was neither "disabled" nor "handicapped" for purposes of the ADA, the Rehabilitation Act, or the PWDCRA (Slip op, pp 16-19). Specifically, the court opined that plaintiff's ADD did not rise to the level of a disability or handicap because it did not substantially limit a major life activity as plaintiff's evidence only established, at best, that ADD rendered her unable to perform a single job for one employer. The district court also opined that plaintiff had failed to show that her ADD affected "cognizable 'major' life activities" or caused difficulties of greater magnitude than those experienced by the general population.

The district court addressed plaintiff's depression-based discrimination claim in a footnote immediately following its ten-page analysis of plaintiff's ADD-based disability claim (Slip op, p 25, n 14):

> The Court's determination that Plaintiff's ADD did not substantially limit the major life activity of working because Plaintiff has only shown that her condition affected her ability to perform one job is equally applicable to Plaintiff's reliance in her Response Brief upon her "depression." As noted above, Plaintiff expressly disclaimed at her deposition that her claims of discrimination were predicated upon any condition other than her ADD. Although Plaintiff now appears to be taking a contrary position, Plaintiff testified [at] her deposition that she did not suffer from depression from June 1995 through the date she was released from employment. [Plaintiff's Dep. pp. 62-63.]
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> Courts have consistently held that temporary psychological impairments, such as Plaintiff's depression, do not constitute ADA-cognizable disabilities. See Sanders V. Aneson Prods., Inc., 91 F.3d 1351, 1354 (9th Cir. 1996), cert. denied, ___ U.S. ___, 117 S. Ct. 1247, 137 L.Ed.2d 329 (1997), (plaintiff's four-month long battle with a psychological disorder held not to amount to an impairment substantially limiting the life activity of working); Johnson v. Foulds, Inc., 1996 WL 41482 (N.D. Ill. 1996), aff'd 111 F.3d 133 (7th Cir. 1997) (plaintiff's mental depression did not qualify as a disability under the ADA given its limited duration); Layser v. Morrison, 935 F. Supp. 562 (E.D. Pa. 1995) (security officer who was suffering from work related stress did not had [sic] an ADA disability

given the temporary nature of his condition); Muller v. Automobile Club of Southern California, 897 F. Supp. 1289 (S.D. Cal. 1995) (psychological impairment resulting from customer's threats was of limited duration and, not a disability under the ADA).

The district court next found that plaintiff's retaliation claim under the ADA was barred by plaintiff's failure to exhaust her administrative remedies. But the court found that plaintiff failed to establish a prima facie case of retaliation under either the Rehabilitation Act or the PWDCRA. In that regard, the court noted that the university only contested whether plaintiff could "produce sufficient evidence from which an inference can be drawn that the adverse action would not have been taken had the plaintiff not filed a discrimination action" (Slip op, p 31). The district court ruled (Slip op, pp 32-34; footnote and citations omitted):

> There is nothing in the record to suggest that Plaintiff was treated differently from similarly-situated employees. As to the timing of Plaintiffs discharge in relation to her complaints to the university's AAO officials, Plaintiff complained to the university officials of unfair treatment in May 1996. She was not discharged until November 18, 1996, six months later. This is too attenuated a time period from which it might reasonably be inferred that Defendants took the complained of adverse employment action because Plaintiff had complained of unfair treatment to university officials six months earlier. . . .
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> Furthermore, there is no evidence of record to establish that her immediate supervisors, Sue Sheppard and Linda Creps, who were the decision-makers here, even knew that Plaintiff had complained to the AAO that she was being unfairly treated until after she was discharged. Moreover, Plaintiff admits that her supervisors tried to work with her to help her succeed throughout 1996.
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> The Court finds under these circumstances that the simple fact that Plaintiffs termination occurred after she had complained of unfair treatment is insufficient to establish the requisite causal link to sustain a retaliation claim.
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> Moreover, even assuming *arguendo* that Plaintiff has made out a *prima facie* claim, Defendants have articulated a legitimate, non-discriminatory reason for her termination wholly unrelated to retaliation: Plaintiff's unsatisfactory job performance.
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> Defendants having articulated a legitimate, non-discriminatory/non-retaliatory reason for terminating Plaintiff's employment, the burden shifts to Plaintiff to establish that this articulated reason is but a pretext for the action undertaken by Defendant.
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> To prove pretext, Plaintiff must show by a preponderance of the evidence either that the proffered reason had no basis in fact, did not actually motivate the employer's action, or was insufficient to motivate the action. Plaintiff has not met this burden.

On November 15, 1999, six days after the district court issued his opinion and judgment, plaintiff filed the instant action in the Washtenaw Circuit Court, alleging in a single count that her termination violated the PWDCRA. Plaintiff's factual allegations in her state complaint in general parallel her federal complaint.

Plaintiff timely appealed the district court judgment to the Sixth Circuit Court of Appeals. During the pendency of the federal appeal, defendants moved for summary disposition in the instant case on the ground that the action was barred by either res judicata or collateral estoppel. The trial court granted the motion in part and denied it in part in an opinion and order dated September 21, 2000.[2] The trial court denied defendants' motion with regard to plaintiff's depression-based discrimination claim, without prejudice, pending a decision by the Sixth Circuit Court of Appeals and also did not dismiss plaintiff's medical testing claim.

On November 22, 2002, the Sixth Circuit Court of Appeals issued its opinion affirming the district court's summary dismissal of plaintiff's federal claims but vacating that "portion of the judgment purporting to dismiss with prejudice the state law claims earlier dismissed without prejudice by the stipulation of the parties, and remand[ing] those claims to the district court with instructions that the record be corrected to reflect that those state law claims were dismissed without prejudice." *Dillon-Barber v Regents of the University of Michigan*, 51 Fed App 946, 947 (CA 6, unpublished opinion issued November 22, 2002). The court noted that *Bd of Trustees of the University of Alabama v Garrett*, 531 US 356; 121 S Ct 955; 148 L Ed 2d 866 (2001) required the dismissal of plaintiff's ADA claims for monetary damages against the university in light of its ruling that the states enjoy Eleventh Amendment immunity from suit in federal court for claims for money damages under the ADA. Accordingly, the Sixth Circuit Court of Appeals vacated "the district court's order to the extent that it dismisses with prejudice Dillon-Barber's state law claims against all defendants and ADA claims against the state." *Dillon-Barber, supra* at 951.

The court, however, did not treat plaintiff's Rehabilitation Act claims as being abandoned because in *Nihiser v Ohio Environmental Protection Agency*, 269 F3d 626 (CA 6, 2002) the Sixth Circuit "held that states waive their Eleventh Amendment immunity with regard to Rehabilitation Act claims (under 42 U.S.C. § 2000d-7) when they accept federal funds, and therefore, a plaintiff may sue a state under § 504 of the Rehabilitation Act." *Dillon-Barber, supra* at 949. Because the district court had not dismissed plaintiff's Rehabilitation Act claims under the Eleventh Amendment, but on the merits, the Sixth Circuit Court of Appeals likewise addressed the merits of plaintiff's discrimination and retaliation claims. The court affirmed the district court decision in that regard, opining as follows:

> The district court concluded that Dillon-Barber was neither disabled nor handicapped as those terms are defined in the ADA and the Rehabilitation Act, and that even assuming that she had made out a prima facie case of retaliation

[2] The trial court signed a second opinion and order on August 1, 2003, which was entered August 6, 2003. The trial court's two opinions will be referred to as TC1 and TC2, respectively.

> under the Rehabilitation Act - - which the court held she had not - - she had wholly failed to provide evidence of pretext. After carefully reviewing the record before us and the parties' briefs on appeal, we are persuaded that nothing more is required for us to address these claims on their merits, and we agree with the district court's analysis. For the reasons stated by that court, we affirm the judgment on those claims in favor of the state. [*Dillon-Barber, supra* at 950.]

After the Sixth Circuit released its opinion, the university renewed its motion for summary disposition in the trial court. In its second opinion and order, the trial court rejected defendants' argument that the doctrine of collateral estoppel precluded plaintiff's depression-based disability claim. The trial court reasoned that a purported stipulation by plaintiff regarding this aspect of her claim was not an adjudication on the merits for the purpose of collateral estoppel. The trial court further reasoned:

> In addition, in this Court's view, Judge Rosen misinterpreted the stipulation, and an offhand comment in a footnote does not rise to the level of an actual holding. The Sixth Circuit did not address the question whether Judge Rosen should or should not have (1) relied on the stipulation or (2) interpreted it as he did, and in affirming Judge Rosen's rulings in a very general way, the Sixth Circuit simply did not address the merits of plaintiff's claim of discrimination based on her depression.
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> Defendants' argument . . . misses the point of this Court's earlier opinion and order. As in their first motion and brief, defendants minimize as much as possible the fact that Judge Rosen's "ruling" on the depression claim was *dicta*, an incidental reference in a footnote. Further, defendants, when they assert that plaintiff argued the merits of her depression disability claim on appeal, quote from the subheadings of plaintiff's appellate brief – not mentioning that in the text of the brief she actually argued that Judge Rosen erroneously relied on the stipulation rather than considering the merits of the claim. This side-stepping of the issue simply implies that defendants have no good argument to support their position on it. Defendants' motion for summary disposition is denied as to this issue, and plaintiff is not collaterally estopped from asserting her claim of discrimination based on her depression. [TC2, pp 4-5.]

The trial court also ruled that collateral estoppel did not preclude plaintiff's state medical testing claim. Although the court recognized that a claim under MCL 37.1202(1)(e) "must meet the requirements for a *prima facie* PWDCRA case: plaintiff must establish that plaintiff is handicapped; the handicap is unrelated to plaintiff's ability to perform the duties of plaintiff's job; and plaintiff was discriminated against in one of the ways described in the statute," citing *Michalski v Bar-Levav*, 463 Mich 723; 625 NW2d 754 (2001), the court nevertheless, rejected defendants' collateral estoppel argument. The trial court reasoned that the district court dismissed plaintiff's medical claim because the district court "found plaintiff was not a person with a disability for purposes of the federal statutes at issue" and for "purposes of her medical testing claim under the PWDCRA, plaintiff need not establish that she is a person with a disability." (TC2, pp 12-13). So, the trial court ruled the federal court determination was not relevant to plaintiff's state medical testing claim. Further, the trial court ruled that the district

court judgment "did not expressly address the issue whether plaintiff could establish pretext with regard to her medical testing claim." *Id*., at 13. Moreover, the trial court ruled that "the so-called 'burden-shifting' analysis of *McDonnell-Douglas* is neither necessary nor appropriate when a plaintiff offers direct evidence of discrimination rather than (or in addition to) circumstantial evidence." *Id*. In that regard, the trial court noted plaintiff pointed to evidence that Creps "expressly relied on the medical exam reports in reaching her decisions that plaintiff did not have a disability and to terminate plaintiff." *Id*., at 21.

In its first opinion and order, the trial court rejected plaintiff's argument that the federal decision left undecided whether she satisfied other prongs of the definition of "disability," ruling:

> The definition of "individual with a disability" includes three subsets, or ways a person can fall within that definition: "is currently," "has a history of being" and "is regarded as" disabled. Judge Rosen's ruling that plaintiff is "not an individual with a disability," it seems to this Court, subsumes the three subsets, i.e., logically, that means plaintiff is not any of the three. This ruling is appealable - - plaintiff has appealed it - - and Judge Rosen's consideration of, or failure to consider, whether plaintiff has a history of disability or is regarded as disabled are not separate or different factual issues. Judge Rosen's ruling is an adjudication of whether plaintiff is an individual with a disability. Since the criteria for proving plaintiff is an individual with a disability under federal law are the same as the criteria for proving she is a person with a disability under state law . . . the factual question whether plaintiff is a person with a disability for purposes of her state law claims has been determined in the earlier lawsuit, and that determination collaterally estops relitigation of the question in this suit. [TC1, 15-16.]

With regard to plaintiff's claims against the individual defendants, the trial court reserved its ruling pending the Sixth Circuit's decision, in part to consider whether the individual defendants were privies of the university after being dismissed from the federal litigation. In its second opinion and order, the trial court agreed with defendants that privity existed because of the master-servant relationship between the university and its employees, the individual defendants. The trial court therefore ruled collateral estoppel applies to plaintiff's allegations against the individual defendants as well as the university. In addition, the trial court ruled that individual supervisors did not come within the definition of "employer" under the PWDCRA, adopting by analogy the holding of *Jager v Nationwide Truck Brockers, Inc*, 252 Mich App 464; 652 NW2d 503 (2002) regarding the identical definition of "employer" under Michigan's Civil Rights Act, MCL 37.2101 *et seq*.

On February 2, 2004, this Court granted the university's application for leave to appeal the trial court's denial of its motion for summary disposition on plaintiff's claims that she was discriminated against because of her depression and subjected to improper medical testing. Plaintiff filed a claim of cross-appeal on February 23, 2004. Plaintiff asserts the trial court erred by dismissing her ADD-based discrimination claim arguing the federal action did not actually determine that issue under the alternative disability definitions of having a record of a disability

or being regarded as having a disability. Plaintiff also asserts the trial court erred by dismissing her PWDCRA claims against the individual defendants.

II. Standard of Review

A trial court's decision on a motion for summary disposition and whether the legal doctrine of collateral estoppel applies are questions of law this Court reviews de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999); *Minicuci v Scientific Data Mgt, Inc*, 243 Mich App 28, 34; 620 NW2d 657 (2000). Such a motion is brought under MCR 2.116(C)(7); this Court must review all affidavits, pleadings, and other documentary evidence presented in a light most favorable to the nonmoving party when evaluating whether summary disposition is appropriate. *Alcona Co v Wolverine Environmental Protection, Inc*, 233 Mich App 238, 245-246; 590 NW2d 586 (1998). Questions of statutory interpretation are also reviewed de novo. *Peden v Detroit*, 470 Mich 195, 200; 680 NW2d 857 (2004).

III. Analysis

A.

We hold that the trial erred by not granting defendants' motion for summary disposition on plaintiff's depression-based disability claim because it is precluded by the doctrine of collateral estoppel. That doctrine provides that when the same parties or their privies have had a full and fair opportunity to litigate a question of fact that was essential to and determined by a valid and final judgment, the finding of fact is conclusive in a subsequent action between the same parties. *Monat v State Farm Insurance Co*, 469 Mich 679, 682-685; 677 NW2d 843 (2004). Mutuality of estoppel is generally required but the doctrine of preclusion "may be asserted defensively against a party who has already had a full and fair opportunity to litigate the issue." *Id.*, at 695. Here, plaintiff's depression-based, disability discrimination claim was actually, fully, and fairly litigated in federal court, and determined adversely to her in a valid and final judgment. Because the standards for a disability claim under the PWDCRA are the same as those employed in the federal action and because the determination of plaintiff's depression-based claim was essential to the federal judgment, the preclusion doctrine of collateral estoppel bars plaintiff's depression-based disability discrimination claim in state court under the PWDCRA.

It is undisputed that plaintiff asserted the same depression-based disability claim in both her federal compliant under the ADA and Rehabilitation Act as she did in her state complaint under the PWDCRA. It is also undisputed that the tripartite definition of "disability" is essentially the same under both the ADA and the PWDCRA law. MCL 37.1103(d); 42 USC 12102(2); *Peden, supra* at 202, 204; *Chmielewski, supra* at 601-603. Plaintiff concedes that collateral estoppel precludes her from litigating in state court whether her ADD was a "current" disability, i.e., a disability under MCL 37.1103(d)(i)(A). But plaintiff argues that the federal district court ruling on plaintiff's depression-based claim was based at least partly on defendants' mischaracterization of a stipulation and, therefore, not actually litigated. Plaintiff also contends that the district court's discussion of plaintiff's depression-based disability claim in a footnote was obiter dictum and that the Sixth Circuit's general affirmation of the district court affords no further guidance on which to base collateral estoppel.

Plaintiff's argument arises out of an ambiguous stipulation her counsel placed on the record at plaintiff's deposition during discovery for the federal action. Although plaintiff alleged several bouts with severe depression that required leaves of absences, she did not specifically identify acts of discrimination based on depression before June 1995 when she was diagnosed with ADD and disclosed this diagnosis to the university. During plaintiff's deposition, defense counsel attempted to determine whether plaintiff was alleging acts of discrimination before June 1995. Plaintiff responded that she was unaware of any overt discrimination before she disclosed that she suffered from ADD. She further indicated that there were several incidents before 1995 that she suspected constituted discrimination based on her obesity. Plaintiff's counsel then asked for a discussion off the record, after which counsel placed the following stipulation on the record:

> Plaintiff is willing to stipulate that no facts regarding discrimination prior to 1995, or June of '95, are alleged in the complaint. The witness has already testified that she was unaware of any at the time. And with the exception of whether obesity might qualify as a disability for purposes of disability discrimination, we are not seeking – claiming disability discrimination prior to June of 1995.
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> * * *
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> To the extent any of the obesity discrimination events that occurred prior to June of 1995 as previously testified to, that would be a basis for a handicap discrimination claim prior to June of '95. But that's the only incident that she's claiming that we're aware of, based on discovery. But we reserve our right to amend our complaint if discovery reveals new facts, but we're not aware of any today. All of the claims, for failure to accommodate, stem from disclosure of ADD and request for accommodation for that event. [Plaintiff's dep, pp 214-215.]

The university understood plaintiff's stipulation as a concession that she was not seeking recovery for depression-based discrimination. Plaintiff, however, contended she made no such concession and expressly argued in her answer to defendants' motion for summary disposition that her depression was part of the basis for her claim of disability discrimination by defendants.

The district court noted that plaintiff's "claims of disability discrimination and failure to accommodate emanate only from her ADD condition beginning in June 1995 and that her depression is not an issue in this action" (Slip op, p 3, n 1). Nevertheless, the court recognized that plaintiff had taken a position contrary to her stipulation in her response to defendants' motion for summary disposition. The court ruled that its analysis of plaintiff's ADD-based claim - - that plaintiff's ADD did not rise to the level of a disability under the ADA because she had failed to show that her ADD substantially limited a major life activity or that it caused difficulties of greater magnitude than those experienced by the general population - - applied equally to her depression-based discrimination claim. The court observed that its "determination that Plaintiff's ADD did not substantially limit the major life activity of working because Plaintiff has only shown that her condition affected her ability to perform one job is equally applicable to Plaintiff's reliance in her Response Brief upon her 'depression.'" (Slip op, p 25, n 14). The court also noted that plaintiff testified in her deposition that she did not suffer from

depression from June 1995 until the date of her termination. Finally, the court ruled that plaintiff's temporary impairment based on depression did not rise to the level of an ADA-cognizable disability. *Id.*

We find that the trial court erred by concluding that the district court based his ruling on a misinterpretation of plaintiff's stipulation and therefore, did not address the merits of plaintiff's depression-based discrimination claim. We also find that the trial court erred by concluding that the district court's disposition of plaintiff's depression-based claim was obiter dictum.

This Court has defined obiter dictum as a "'judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive).'" *People v Higuera*, 244 Mich App 429, 437; 625 NW2d 444 (2001), quoting Black's Law Dictionary (7th ed). Here, plaintiff's depression-based disability discrimination claim was actually and necessarily determined in the federal action. Plaintiff alleged in her federal complaint that she had a disability based on her depression and that defendants discriminated against her. Defendants sought the summary dismissal of plaintiff's complaint in its entirety. Although ambiguity existed regarding plaintiff's stipulation, plaintiff argued the merits of her depression-based claim in opposition to defendants' motion for summary disposition. Because the merits of the claim were placed before the district court, the court had to address its merits in order for it to summarily dismiss plaintiff's case in its entirety. The district judge did so by applying the law to facts developed through discovery. A claim has been actually litigated when it is raised in the pleadings, submitted to the decision maker, and determined. *VanDeventer v Michigan National Bank*, 172 Mich App 456, 463; 432 NW2d 338 (1988); Restatement Judgments, 2d, § 27, Comment *d.*

The district court ruled that plaintiff's depression-based disability discrimination claim lacked legal merit because plaintiff had not shown her condition substantially limited the major life activity of working. The court also determined that plaintiff's depression-based claim lacked legal and factual merit because plaintiff admitted during her deposition that she had not suffered a bout of depression between June 1995 and her discharge from employment. Further, any temporary psychological impairments plaintiff experienced before June 1995 did not constituted "ADA-recognized disabilities." The fact that the district court's dispositive ruling appears in a footnote does not automatically render it dicta. Because plaintiff argued she was disabled on the basis of several physical or mental impairments, the district court's ruling on plaintiff's depression-based disability claim, even though in a footnote, was essential to the court's ability to dismiss the case in its entirety. Thus, the district court's ruling on plaintiff's depression-based claim triggers the application of the collateral estoppel doctrine. See Restatement Judgments, 2d, § 27, Comment *g*: "If several issues are litigated in an action, and a judgment cannot properly be rendered in favor of one party unless all of the issues are decided in his favor, and judgment is given for him, the judgment is conclusive with respect to all the issues."

Our conclusion on this issue is not altered even if the district court also found that plaintiff abandoned her depression-based claim. Plaintiff exercised her right to appeal the district court judgment to the Sixth Circuit Court of Appeals. She argued that counsel's stipulation was mischaracterized and that the district court erred by finding that plaintiff's depression was not a cognizable disability. Contrary to the version of plaintiff's argument the trial court accepted, the Sixth Circuit Court of Appeals was not required to extensively explicate

its reasoning for affirming the district court on the merits. "In issue preclusion, it is the prior *judgment* that matters, not the court's opinion explicating the judgment." *Yamaha Corp of America v United States*, 961 F2d 245, 254 (CA DC, 1992). "'Even in the absence of *any* opinion a judgment bars relitigation of an issue necessary to the judgment.'" *Id*., quoting *American Iron & Steel Inst v EPA*, 886 F2d 390, 397 (CA DC, 1989).

The Sixth Circuit affirmed on the merits the district court's determination that plaintiff did not have a cognizable disability. This affirmation necessarily rejected plaintiff's arguments before both the district court and the Sixth Circuit that she was disabled within the meaning of the federal anti-discrimination statutes by reason of her depression. The appellate court opined that it had carefully reviewed the record and the parties' briefs on appeal and concluded "that nothing more is required for us to address these claims on their merits, and we agree with the district court's analysis." *Dillon-Barber, supra* at 950. When a judgment is based on alternative grounds, either of which standing alone suffices to support the result, and the judgment is affirmed on appeal without specifying either ground or some other ground as determinative, the judgment is conclusive as to both grounds. See *Amalgamated Transit Union v Southeastern Michigan Transportation Authority*, 437 Mich 441, 453; 473 NW2d 249 (1991), quoting 1B Moore, Federal Practice, ¶ 0.416(2), p 518; Restatement Judgments, 2d, § 27, Comment *o*.[3] Thus, we conclude that even if the district court judge viewed plaintiff's stipulation as an

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[3] Comment *o* of § 27 provides:

> If a judgment rendered by a court of first instance is reversed by the appellate court and a final judgment is entered by the appellate court (or by the court of first instance in pursuance of the mandate of the appellate court), this latter judgment is conclusive between the parties.
>
> If the judgment of the court of first instance was based on a determination of two issues, either of which standing independently would be sufficient to support the result, and the appellate court upholds both of these determinations as sufficient, and accordingly affirms the judgment, the judgment is conclusive as to both determinations. In contrast to the case discussed in Comment *i*, the losing party has here obtained an appellate decision on the issue, and thus the balance weighs in favor of preclusion.
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> If the appellate court upholds one of these determinations as sufficient but not the other, and accordingly affirms the judgment, the judgment is conclusive as to the first determination.
>
> If the appellate court upholds one of these determinations as sufficient and refuses to consider whether or not the other is sufficient and accordingly affirms the judgment, the judgment is conclusive as to the first determination.

alternative basis for his ruling, the court's determination on the merits of plaintiff's depression-based claim is still conclusive.

In any event, we find it is impossible to read the Sixth Circuit Court of Appeals' opinion in any other way than as affirming on the merits the district court's determination that plaintiff failed to establish a cognizable depression-based disability discrimination claim. Accordingly, the district court's finding of fact in that regard is conclusive because plaintiff had a full and fair opportunity to litigate the issue that was essential to and determined by a valid and final federal court judgment. *Monat, supra* at 682-685; *VanVorous v Burmeister*, 262 Mich App 467, 479-480; 687 NW2d 132 (2004). For these reasons the trial court erred by not granting defendants summary disposition on plaintiff's depression-based disability discrimination claim.

B.

We also conclude that the trial court erred by not granting defendants summary disposition on plaintiff's medical testing claim. Plaintiff did not plead a violation of MCL 37.1202(e), but even if she did, the claim is precluded by the federal court determinations that plaintiff did not suffer from a cognizable disability, and even if she did, defendants proffered legitimate, non-discriminatory reasons for its actions that plaintiff could not prove was pretextual.

The federal and state regulatory schemes regarding medical testing are fundamentally different. The federal statute, 42 USC 12112(d), provides in pertinent part regarding conducting disability-related medical examinations as follows (emphasis added):

> **(**4) Examination and inquiry.
>
> (A) Prohibited examinations and inquiries. A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, *unless such examination or inquiry is shown to be job-related and consistent with business necessity*.
>
> (B) Acceptable examinations and inquiries. A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

In contrast to the federal statute, which regulates when a medical examination may be required, and its scope, MCL 37.1202(e) prohibits an employer from "[d]ischarg[ing] or tak[ing] other discriminatory action against an individual on the basis of physical or mental examinations that are not directly related to the requirements of the specific job."

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). The Legislature's intent is found first and foremost in the language of the statute itself. *Id*.; *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). By its plain and

unambiguous terms, § 1202(e) regulates neither *when* a physical or mental examinations may occur, nor the *scope* of any examination conducted. It only regulates what an employer may do on the basis of such examinations. "Where statutory language is clear and unambiguous, its plain meaning reflects legislative intent, and judicial construction is not permitted." *Michalski, supra* at 731. In that regard, the statute is also clear and unambiguous: an employer may not "discharge or take other discriminatory action." This clause must be considered in the context of its placement in a section of unlawful employer disability-based discriminatory action, and in the further context of the PWDCRA regulating discrimination in general on the basis of a person's disabilities. *Id*. "In interpreting [a] statute . . ., we consider both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.'" *Sun Valley Foods, supra* at 237, quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995). Accordingly, in context, the phrase "or other discriminatory action" modifies "discharge" and both "discharge" and "other discriminatory action" must be disability-based discrimination. Thus, MCL 37.1202(e) prohibits an employer from engaging in disability-based discrimination on the "basis of physical or mental examinations that are not directly related to the requirements of the specific job."

Our Supreme Court in *Peden* recently confirmed this interpretation of the statute. The Court explained that "[u]nder MCL 37.1202(1)(a)-(e), which prohibits employment discrimination, an 'employer' shall refrain from taking any of a number of adverse employment actions against an individual 'because of a disability . . . that is unrelated [or not directly related] to the individual's ability to perform the duties or a particular job or position.'" *Peden, supra* at 203-204. The Court further opined, *id*., at 204-205:

> The plaintiff bears the burden of proving a violation of the PWDCRA. "To prove a discrimination claim under the [PWDCRA], the plaintiff must show (1) that he is [disabled] as defined in the act, (2) that the [disability] is unrelated to his ability to perform his job duties, and (3) that he has been discriminated against in one of the ways delineated in the statute." *Chmielewski, supra* at 602.
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> Once the plaintiff has proved that he is a "qualified person with a disability" protected by the PWDCRA, he must next demonstrate that he has been discriminated against in one of the ways set forth in MCL 37.1202.

Consequently, to prove a violation of MCL 37.1202(e) a plaintiff must show that (1) she has a disability as defined in the PWDCRA, (2) the disability is unrelated to her ability to perform her job duties, (3) she was discharged or otherwise discriminated against "on the basis of physical or mental examinations that are not directly related to the requirements of the specific job." This last element would include when an examination discloses a physical or mental characteristic of the person examined, or sets a physical or mental standard that is not directly related to the requirements of the specific job. Thus, in *Merillat v Michigan State University*, 207 Mich App 241; 523 NW2d 802 (1994), the plaintiff was discharged for not taking a psychological test unrelated to the requirements of the plaintiff's job. The Court opined, "[a] liberal construction of the provisions of the [PWDCRA] will not allow us to permit a plaintiff that has been discharged after 'failing' an alleged irrelevant physical or psychological

examination to assert a cause of action, yet preclude that same plaintiff from doing so upon being discharged for refusing to submit to the same." *Merillat, supra* at 246.

Here, without citation to authority the trial court erroneously concluded that a person claiming a violation of § 1202(e) need not establish he has a disability as defined by the PWDCRA. Plaintiff argues that the trial court correctly interpreted the statute based on the express terms of § 1202(e) that it applies to "individuals" and that any "person" may sue for a violation of the PWDCRA, citing MCL 37.1606(1). This argument mirrors plaintiff's argument under federal law submitted to the Sixth Circuit Court of Appeals.[4] But the federal authority on which plaintiff relies does not apply to § 1202(e) because the Michigan statute does not limit *when* an exam may be conducted or its *scope*. As our Supreme Court noted, while the ADA and the PWDCRA are substantially alike and analysis under each will generally be similar, "because the acts are not identical, and because federal laws and regulations are not binding authority on a Michigan court interpreting a Michigan statute, we caution against simply assuming that the PWDCRA analysis will invariably parallel that of the ADA." *Peden, supra* at 217.

Plaintiff's complaint in this case contains no allegations that she was discriminated against on the basis of a physical or mental examination. Rather, she complains that the university required an examination, that it was unnecessary in her view, and that its scope was too broad. Plaintiff does not even allege that the medical testing required by defendants formed the basis for her discharge or other discriminatory action, only that it was evidence of a pattern of disability-based discrimination because it was unnecessary. Indeed, viewing the facts in the light most favorable to plaintiff, the only thing we can ascertain that resulted from the medical examination was a report to the university recommending accommodation for ADD. But assuming that the complaint does allege a violation of § 1202(e), the federal court determination, fully and fairly litigated, that plaintiff is not disabled precludes relitigating that necessary element again. *Monat, supra* at 682-685, 695.

Our conclusion is unaffected by the trial court's observation that plaintiff "points out that there is direct evidence that defendant Boyle-Creps, the person who terminated plaintiff, expressly relied on the medical exam reports in reaching her decisions that plaintiff did not have a disability and to terminate plaintiff."[5] The trial court also accepted plaintiff's argument that "the so-called 'burden-shifting' analysis of *McDonnell-Douglas* is neither necessary nor appropriate when a plaintiff offers direct evidence of discrimination."[6] But even in a direct

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[4] In her federal appellate brief plaintiff argues it is unnecessary for her to prove she was disabled to succeed on her medical examination claim, citing *Roe v Cheyenne Mountain Conference Resort, Inc*, 124 F3d 1221 (CA 10, 1997), *Cossette v Minnesota Power & Light*, 188 F3d 964 (CA 8, 1999), and *Fredenburg v Contra Costa Co Dep't of Health Services*, 172 F3d 1176 (CA 9, 1999).

[5] The trial court does not cite where this direct evidence is located and we have not found it.

[6] A plaintiff may prove a discrimination case with circumstantial evidence by employing the burden-shifting framework adopted by *McDonnell Douglas v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). Under the *McDonnell Douglas* approach, a prima facie case consists of
(continued…)

evidence, a so-called mixed-motive case, "where the adverse employment decision could have been based on both legitimate and legally impermissible reasons, a plaintiff must prove that the defendant's discriminatory animus was more likely than not a 'substantial' or 'motivating' factor in the decision." *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 133; 666 NW2d 186 (2003). Using either direct evidence or circumstantial evidence employing the *McDonnell Douglas* burden-shifting framework, "a plaintiff must establish a causal link between the discriminatory animus and the adverse employment decision." *Id*., at 134-135. Plaintiff's failure to present sufficient evidence to establish a genuine disputed issue of fact that such a causal link to discriminatory animus exists is fatal to her claim whether she relies on direct evidence or burden-shifting circumstantial evidence. *Sniecinski, supra* at 136; *Collins v Blue Cross Blue Shield of Michigan*, 228 Mich App 560, 569, 574; 579 NW2d 435 (1998).

Here, the district court's finding that plaintiff could not establish a causal link to discriminatory animus, affirmed by the Sixth Circuit Court of Appeals, *Dillon-Barber, supra* at 950, precludes plaintiff from litigating again whether she can establish such a link in state court, *Monat, supra* at 682-685, 695. The district court found that defendants "have articulated a legitimate, non-discriminatory reason for her termination wholly unrelated to retaliation: Plaintiff's unsatisfactory job performance." (Slip op, p 33). The district court ruled (record citations omitted):

> Although Plaintiff baldly asserts that Plaintiff's unsatisfactory job performance was not the true reason for her discharge, she has no evidence to support this assertion. Furthermore, Plaintiff admits her job deficiencies. Plaintiff also admits that she knows of no other employee with the same performance deficiencies who was treated differently. In sum, the Court finds that Plaintiff has not established that her discharge was pretextual. [*Id*., at 34.]

The Sixth Circuit Court of Appeals affirmed the district court's determination by opining that "[a]fter carefully reviewing the record before us and the parties' briefs on appeal, we are persuaded that nothing more is required for us to address these claims on their merits, and we agree with the district court's analysis." *Dillon-Barber, supra* at 950.

We therefore conclude that plaintiff's medical testing claim fails because she has not alleged a violation of § 1202(e). To the extent that she has, plaintiff must, contrary to the trial court's ruling, still establish disability-based discrimination. In that regard, the fully and fairly litigated factual determinations in federal court - - that plaintiff does not have a disability as similarly defined under state and federal law, and that even if she has a disability, she cannot

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evidence that the plaintiff (1) belongs to a protected class, (2) suffered an adverse employment action, (3) was qualified for the position, and (4) the adverse employment action was taken under circumstances giving rise to an inference of unlawful discrimination. See *Hazle v Ford Motor Co*, 464 Mich 456, 462-463; 628 NW2d 515 (2001). This framework also applies in disability discrimination cases. *Peden, supra* at 205; *Hall v McRea Corporation*, 238 Mich App 361, 370-371; 605 NW2d 354 (1999), remanded 465 Mich 919; 638 NW2d 748 (2001).

establish a causal link to discriminatory animus - - preclude plaintiff from litigating her medical examination claim in state court. *Monat, supra* at 682-685, 695.

C.

Next, we hold the trial court correctly ruled that the federal court's judgment that plaintiff was not disabled applies to all three alternative definitions of "disability" under both federal and state law.

The tripartite definition of "disability" is essentially the same under both state and federal law. MCL 37.1103(d); 42 USC 12102(2); *Peden, supra* at 202, 204; *Chmielewski, supra* at 601-603. Plaintiff presented to the federal district court what evidence she had applicable to each definition and her arguments in support of each definition. The court's opinion clearly indicates it was fully cognizant of plaintiff's history of psychological problems and depression, and defendants' record of accommodation and efforts in assisting plaintiff to succeed at her job. Moreover, it is clear the district court considered plaintiff's evidence and her arguments yet nonetheless concluded that plaintiff did not have a disability. Indeed, the court specifically rejected plaintiff's history of depression as a basis for finding she had a cognizable disability.

Furthermore, plaintiff argued to the Sixth Circuit Court of Appeals that the district court erred by not considering plaintiff as being "disabled" under the alternative basis of having a "a record of" depression and ADD, 42 USC 12102(2)(B), and "being regarded as having" depression-based and ADD-based disability, 42 USC 12102(2)(C). Yet, the Sixth Circuit affirmed the district court after "carefully reviewing the record before us and the parties' briefs on appeal" and concluding "that nothing more is required for us to address these claims on their merits." *Dillon-Barber, supra* at 950.

"When an issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined, the issue is actually litigated." Restatement Judgments, 2d, § 27, comment *d*. Because plaintiff had a full and fair opportunity to litigate this issue in federal court and because the federal court's finding that plaintiff could not satisfy the tripartite definition of "disability" was essential to the judgment that was actually litigated and determined by a valid and final judgment, collateral estoppel precludes relitigating this issue. *Monat, supra* at 682-685.

D.

Last, plaintiff argues that the trial court erred by extending to the PWDCRA the holding of *Jager, supra*. The university argues that the trial court dismissed plaintiff's claims against the individual defendants both because they did not come within the purview of the PWDCRA and because the claims were barred by collateral estoppel because even though the individual defendants were dismissed from the federal action, they were in privity with the university. We find that plaintiff has abandoned this issue because she failed to adequately brief it. *Yee v Shiawassee County Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

Moreover, plaintiff's claims against the individual defendants fail on the merits. Plaintiff based all of her claims against the university on evidence of the actions or inactions of the individual defendants. For the same reasons that collateral estoppel bars plaintiff's claims

against the university it also bars claims against the individual defendants because privity exists between the university and its agents and servants. *Viele v DCMA*, 167 Mich App 571, 580; 423 NW2d 270 (1988), modified on other grounds 431 Mich 898; 432 NW2d 171 (1988). Mutuality is not required where collateral estoppel is asserted defensively against a party who has already had a full and fair opportunity to litigate the issue. *Monat, supra* at 695.

As already noted, the district court found that defendants articulated a legitimate, non-discriminatory reason for her termination wholly unrelated to retaliation: her unsatisfactory job performance. Further, the district court determined plaintiff completely failed to produce evidence of pretext and this determination was affirmed on appeal. *Dillon-Barber, supra* at 950. Plaintiff's failure to establish a causal link between protected activity and adverse employment action is fatal to a retaliation action against the individual defendants. *Aho v Dep't of Corrections*, 263 Mich App 281, 288-289; 688 NW2d 104 (2004). So, collateral estoppel bars plaintiff's claims against the individual defendants. *Monat, supra* at 682-685, 695.

E.

We hold that plaintiff's PWDCRA discrimination claims are precluded by collateral estoppel because the factual issue of whether she has a cognizable disability was fully and fairly litigated adversely to her in the federal court. Moreover, even if plaintiff could establish she had a disability, the fully and fairly litigated factual determination that defendants had a legitimate, non-discriminatory reason for its actions - - unsatisfactory job performance - - that plaintiff could not show to be pretextual, precludes all of plaintiff's state disability-discrimination claims.

We further hold that the trial court misinterpreted MCL 37.1202(e) by finding a person claiming a violation of that statute need not show disability-based discrimination and by finding that the statute regulated when employers may require physical or mental examinations. By its plain language, the statute only prohibits using such examinations as a basis to engage in disability-based discrimination, which plaintiff does not allege occurred here. Because facts necessary for plaintiff's § 1202(e) claim have been fully and fairly determined adversely to her in federal court, this claim is also precluded by the doctrine of collateral estoppel.

The trial court correctly ruled that the federal judgment is conclusive as to all three alternative definitions of "disability."

Plaintiff has abandoned her argument regarding the individual defendants. Moreover, plaintiff's claims against the individual defendants lack merit because privity exists between the university and its agents and servants and because mutuality is not required when collateral

estoppel is asserted defensively against a party who has already had a full and fair opportunity to litigate the issue. So, collateral estoppel bars plaintiff's claims against the individual defendants.

We affirm in part, reverse in part, and remand for entry of judgment for defendants. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Peter D. O'Connell